SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1968

No. [redacted] 52

MAKAH INDIAN TRIBE, as a tribe and as a federal corporation, on its own behalf and on behalf of each of its members, *Appellants*

v.

TAX COMMISSION OF THE STATE OF WASHINGTON; GEORGE KINNEAR, Tax Commissioner and Chairman of the Tax Commission of the State of Washington, and JANE DOE KINNEAR, his wife; G. MERTON DICK, Tax Commissioner of the State of Washington, and JANE DOE DICK, his wife; CLARK SQUIRE, Tax Commissioner of the State of Washington, and JANE DOE SQUIRE, his wife, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS

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STATE PRINTING PLANT 3 OLYMPIA, WASHINGTON

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No. 1280

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Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Appellee Tax Commission of the State of Washington respectfully moves that this Court enter an order dismissing the appeal on the grounds that this case does not present a substantial federal question.

QUESTION PRESENTED

Can a state impose upon cigarette wholesalers who are generally subject to its jurisdiction an excise tax measured by the total number of cigarettes handled, or does the Indian Commerce Clause require a deduction for those cigarettes which are eventually sold by a retailer within the boundaries of an Indian reservation?

COUNTER-STATEMENT OF THE CASE

The cigarette tax of the state of Washington is of the type, now widely adopted by the various states, which is normally paid to the state by the wholesale seller of cigarettes. His liability is established when he is the first person to sell, use, consume, handle or distribute the cigarettes in the state. The amount of the tax is determined by the number of cigarettes involved.

This tax is paid by the purchase of cigarette tax stamps by the wholesaler from the state, or by the remittance to the state of the amount indicated on an authorized metered stamping machine in the possession of the wholesaler. Payment is enforced by statutory prohibitions against the sale of cigarettes not bearing a stamp, or other authorized indicia of payment.

In this action, the Makah Indian Tribe sought to obtain a judgment declaring that this tax, to the extent that it is measured by cigarettes which are

eventually sold by a retail seller to the Tribe itself, or to any of its members, on the Makah Indian Reservation, violates the constitutions of the United States and of the State of Washington.

ARGUMENT

There is no federal question presented in this case which is sufficiently substantial to merit the attention of this Court. Basically, the only issue involved is whether the State of Washington has the power to impose a tax upon persons doing business within its borders and outside of any possible enclave removed from its jurisdiction. This power is an adjunct to the sovereignty of each of the several states, and has been upheld in its exercise without question of its existence.

It is, admittedly, not an unrestricted power. There are persons, things and activities which are not subject to a particular state's taxing power. Among the limitations on that power are those resulting from the grant to Congress of the power to regulate commerce with the Indian tribes, contained in Article I, section 8, clause 3 of the Federal constitution. This grant, the appellant has asserted, removes the cigarette wholesaler, at least partially, from the taxing power of the State of Washington. The cigarette wholesaler, however, is not an Indian. He is not an Indian trader licensed by the Secretary of the Interior. He does not sell to any licensed Indian traders. He is not doing any business at all on

any Indian reservation. The only business he does is selling and distributing cigarettes, outside of the confines of any Indian reservation, to retail dealers, some of whom maintain outlets on Indian reservations. We submit respectfully that he is not involved in Indian commerce, and that, therefore, a tax upon him does not present a federal question.

If the wholesaler himself is not directly so engaged, the appellant urges that this tax upon him indirectly imposes a burden which would disarrange the statutory plan to protect the Indian from unfair prices, and which would, therefore, render the tax unconstitutional.

Language in *Warren Trading Post Company v. Arizona State Tax Commission*, 380 U.S. 685 (1965) is relied upon by the appellant to establish this indirect "burden" theory. In fact, that case dealt with a tax which, as a charge upon retail sales, was a *direct* burden upon the transactions between a licensed Indian trader and his Indian customers. Appellant has cited no authority, and this appellee is satisfied that in fact there is none, invalidating state legislation because of effects resulting indirectly from its application. This Court has, in fact, held that the Indian consumer is not insulated from the common economic burden in *Superintendent of Five Civilized Tribes v. Commissioner of Internal Revenue*, 295 U.S. 418 (1935).

The state is, then, accused of attempting indirectly to enter the federally-occupied field of price

control in Indian trade. In defense, it submits that its only effort is entering directly the unoccupied field of taxation of cigarette wholesalers. Although this tax may result ultimately in an increase in the price of goods to a constitutionally protected consumer, that fact alone does not convert the tax into an invalid burden upon such a consumer. If the price increase does constitute a federal question, and this appellee submits that in this case it does not, the decision of this Court in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), has, by deciding it, deprived that question of its substance.

CONCLUSION

The incidence of the tax involved in this case does not, legally or factually, fall upon an Indian, Indian tribe, or Indian trader. It does fall only upon individuals unquestionably subject to the taxing jurisdiction of the State of Washington. This appellee respectfully submits that the application of this tax in this manner presents no substantial federal question. Further, it is submitted that the imposition of excise taxes upon one not standing in the stream of Indian commerce ultimately has a collateral economic effect upon such commerce, but that this effect is too indirect and remote to create a federal question of substance. This appellee urges, therefore, that this appeal be dismissed.

Respectfully submitted,

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